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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES MATLEAN,	Case No. 3:16-cv-00233-HDM-CBC
<div style="text-align: right;">Petitioner,</div>	<div style="text-align: right;">ORDER</div>
<div style="text-align: center;">v.</div>	
BRIAN WILLIAMS, et al.,	
<div style="text-align: right;">Respondents.</div>	

This court granted respondents’ motion to dismiss James Matlean’s 28 U.S.C. § 2254 petition in part (ECF No. 28). The court concluded that several claims did not relate back to the second-amended petition and thus were subject to dismissal as time-barred. Now before the court is Matlean’s motion for reconsideration of that order (ECF No. 30). Respondents opposed (ECF No. 32), and Matlean replied (ECF No. 33).

District courts possess inherent authority to reconsider and rescind interlocutory orders while a case remains pending. *See Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). Changes in legal or factual circumstances, newly discovered evidence, clear error, a manifestly unjust decision by the court, or an intervening change in controlling law may warrant reconsideration. LR 59-1(a). However, motions for reconsideration are disfavored. LR 59-1(b).

Matlean urges the court to reconsider its decision that several claims in the third-amended petition do not relate back and are untimely (ECF No. 30). Matlean reasserts

1 his argument that the claims in his second-amended petition need only relate back to
2 either his original *pro se* filing or his *pro se* first-amended petition.

3 As set forth in this court's order granting the motion to dismiss in part and in the
4 original order directing Matlean to amend, Matlean's first filing failed to set forth any
5 grounds for federal habeas relief. This court specifically explained:
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7 Petitioner's filing is insufficient. He must set forth each ground for
8 federal habeas relief in the space provided on this court's form and
9 otherwise complete the form. The court shall not sort through the more
10 than 100 pages in an attempt to discern what claims petitioner wishes to
11 raise. Moreover, petitioner has not indicated what grounds he asserted in
12 his still-pending second state postconviction. Accordingly, petitioner shall,
13 within forty-five days of the date of this order, file an amended petition, on
14 the court's form, that sets forth each ground for which he seeks federal
15 relief (ECF No. 5, pp. 1-2).

16 In response to that order, Matlean timely filed his first-amended petition
17 (ECF No. 8).

18 Matlean argues that his original petition sufficiently incorporated the attachments
19 he included, and therefore, that claims in his third-amended petition may relate back to
20 either his original or first-amended petition. Habeas Rule 2 prescribes that a petitioner
21 must use the court-required form or substantially follow the form and that the petition
22 must specify all grounds for relief available to the petitioner and the facts supporting
23 each ground. The Supreme Court has recognized an exception when the habeas
24 petition expressly incorporates attached material by reference. *Dye v. Hofbauer*, 546
25 U.S. 1 (2005). In *Dye*, the Court concluded that incorporation was sufficient because
26 the habeas corpus petition "made clear and repeated references to an appended
27 supporting brief, which presented [petitioner's] federal claim with more than sufficient
28 particularity." *Id.* at 4.

1 Matlean argues in the motion for reconsideration that the subsequent
2 Ninth Circuit Court of Appeals July 2018 opinion in *Ross v. Williams* supports his
3 position. 896 F.3d 958. In *Ross*, the petitioner used this court's form, but wrote
4 substantially the same thing under each ground:

5 Counsel was ineffective for failing to:

- 6 1) Secure a speedy trial
- 7 2) Failed to review evidence and adequately prepare
- 8 3) Failed to file pretrial motions
- 9 4) Failed to argue the prejudice of evidence lost prior to trial
- 10 5) Failed to prepare for jury selection
- 11 6) Failed to prepare for trial
- 12 7) Failed to retain defense experts
- 13 8) Failed to object to the state's use of expert witness

14 Ross also attached a copy of the Nevada Supreme Court's order of
15 affirmance. *Id.* at 962-963. The district court appointed counsel for Ross, and he
16 filed an amended petition after the AEDPA statute of limitations had expired. *Id.*
17 at 963.

18 The Ninth Circuit concluded that Ross' attachment of the Nevada Supreme Court
19 order of affirmance did not serve to make that document part of his habeas petition. *Id.*
20 at 966-967. The court reaffirmed its reasoning in *Dye* and explained that Ross did not
21 make clear and repeated references to the attachment and that the attachment did not
22 present his claims with more than sufficient particularity. *Id.* at 967.

23 Contrary to Matlean's assertions, *Ross* in fact supports this court's conclusion
24 that Matlean's original filing failed to set forth any claims for relief. Matlean's filing
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1 consisted of a single page of the form petition (page 2, which asks for information such
2 as state case number, sentence, state plea and state counsel) followed by a
3 handwritten page that stated “petitioner has attached his grounds in the exact same
4 format each ground was presented to [the state courts] to fulfill the requirements of
5 exhaustion under AEDPA provisions” Despite this statement, Matlean did not set
6 forth grounds as presented to the state court. Instead, what follows are more than 130
7 pages of state-court proceedings, including a motion for reconsideration, the Nevada
8 Supreme Court order affirming his convictions, appellate briefs, his state postconviction
9 petition and the state district court order denying the petition (see ECF No. 6). Matlean
10 used no other part of the form petition, and thus, he did not even have a petition to
11 incorporate any attachments. It was unclear what claims he sought to raise.¹

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14 Accordingly, the court directed Matlean to file an amended petition.

15 Matlean has not persuaded the court that there is a basis to reconsider its
16 decision on the motion to dismiss. The motion for reconsideration is denied.

17 **IT IS THEREFORE ORDERED** that petitioner’s motion for reconsideration (ECF
18 No. 30) is **DENIED**.

19 **IT IS FURTHER ORDERED** that respondents’ motion for extension of time to
20 respond to the motion for reconsideration (ECF No. 31) is **GRANTED**.

21 **IT IS FURTHER ORDERED** that petitioner’s motion for leave to file notice of
22 supplemental authorities (ECF No. 34) is **GRANTED**. The Clerk shall detach and file the
23 notice of supplemental authorities and exhibit at ECF Nos. 34-1 and 34-2.
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28 ¹ Moreover, subsequent to the briefing on the motion for reconsideration, the Ninth Circuit has decided to rehear *Ross v. Williams en banc*. 920 F.3d 1222 (9th Cir. April 16, 2019) (see ECF No. 34).

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IT IS FURTHER ORDERED that respondents shall file an answer within **30 days** from the date of this order.

IT IS FURTHER ORDERED that petitioner shall have **30 days** following service of respondents' answer in which to file a reply.

DATED: June 6, 2019.



HOWARD D. MCKIBBEN
UNITED STATES DISTRICT JUDGE